93-357

Supreme Court, U.S.
FILED
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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

LEE KRUEGER and MARY DELACOUR,
*Petitioners,*

vs.

DON FUHR,
*Respondent.*

Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

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Supreme Court
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## QUESTIONS PRESENTED FOR REVIEW

I. For the purposes of a Summary Judgment Motion, where the court must view all facts in the light most favorable to Appellants, was Respondent's use of deadly force to apprehend a suspect reasonable for the purposes of the Fourth Amendment protection against unreasonable seizures, where Respondent police officer had probable cause to believe the suspect had committed a dangerous felony, where the officer had an opportunity to otherwise apprehend the suspect, and where there is a dispute of fact as to whether the suspect was armed or whether the officer believed him to be armed?

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### OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri, Southern Division, is not officially reported. It is, however, set out in Appendix B to this Petition. The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 991 F.2d 435. It is also set out in Appendix A to this Petition.

### JURISDICTION

Petitioners initiated suit under 42 U.S.C. §1983 claiming that Respondent acted under color of state law to deprive their deceased son of his rights guaranteed by the Fourth Amendment

to the United States Constitution. This suit poses a Federal question and the District Court's jurisdiction was based on 28 U.S.C. §1331.

Petitioners initiated this suit in the United States District Court for the Western District of Missouri, Southern Division. Respondent filed a Motion for Summary Judgment and the District Court's Order overruling said Motion was filed on May 7, 1992. Respondent then filed a timely Motion to set aside and reconsider and the District Court's Order denying said Motion was filed on June 10, 1992. Respondent herein timely filed his Notice of Appeal, appealing that judgment to the United States Court of Appeals for the Eighth Circuit. On April 9, 1993, the Eighth Circuit handed down its opinion reversing and remanding the case to the District Court for entry of Summary Judgment in favor of Respondent. Petitioners timely filed a Petition for Rehearing and the Eighth Circuit entered its Order denying said Motion on June 1, 1993. This Court's jurisdiction is bestowed by 28 U.S.C. §1254 (I).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves 42 U.S.C. §1983 which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of the state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

It also involves the Fourth Amendment to the United States Constitution which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

## STATEMENT OF THE CASE

Leroy Krueger was the son of Petitioners, Lee Krueger and Mary Delacour. On the evening of June 5, 1989, Leroy was visiting at the apartment of his cousin, Michael Allen Porter, in Springfield, Missouri. Leroy was wearing jeans and a black jersey bearing the number "12" in white letters. (T. at 126). At some point after midnight, Leroy and Mr. Porter left the apartment and went to a nearby convenience store where they arrived around 1:30 a.m. on June 6, 1989. (T. at 128). Mr. Porter entered the store and when he came back outside, Leroy was gone. Mr. Porter then walked back to his apartment. (T. at 130). At approximately 2:00 a.m. on June 6, 1989, Leroy apparently arrived at the American Laundry Service, also referred to as the Tri States Laundry Service, where Leroy had been previously employed. What happened at the laundry service is in dispute.

Leroy apparently encountered Robert Christy who was a supervisor at the laundry service. Mr. Christy states that Leroy threatened him with a knife as he exited his car. (T. at 220). After the encounter, Leroy walked to the 1000 block of Walnut where he stopped at a house and requested to use their phone. He called Mr. Porter and requested that Mr. Porter come get him. During this phone conversation, Leroy's version of the encounter at the laundry service was that Mr. Christy had chased him and hit him with his car. (T. at 131-132). One of the residents of the home where Leroy used the telephone was Christopher John Schmidt.

Mr. Schmidt states that Leroy handed him a knife. He threw the knife on the ground in the front yard and Leroy picked it up before leaving the house.

What is undisputed is that at approximately 2:18 a.m. the Springfield Police Department received a report that a male white subject, wearing black jeans and a black shirt with a number 12 on it, had pulled a knife on someone at Tri States Laundry and then ran away. This information was transmitted to police units in the field via the radio dispatching center in substantially the following form:

> [Dispatcher]: "Reference the assault at Tri State Laundry, 725 E. Trafficway. K-9 security is possibly in pursuit of this subject on foot, Walnut and John Q. Hammons, subject described as white/male wearing black shirt with number 12 on it and blue jeans, subject will be armed with a knife. 0227 hours." (T. at 195).

Respondent, Don Fuhr, is a police officer with the Springfield, Missouri Police Department and was on duty in the early morning of June 6, 1989. Officer Fuhr heard this information over his police radio. (T. at 22). As he responded in his patrol vehicle, Officer Fuhr heard several dispatch transmissions over his radio describing Leroy and indicating that he may be armed with a knife. (T. at 198-200). The final dispatch transmittal indicated that Leroy had been spotted in the 1000 block of East Walnut on the south side of the street. Officer Fuhr pulled onto East Walnut Street and as he drove westbound on Walnut Street, he observed an individual, later identified as Leroy Krueger, lying on the pavement on his stomach between two automobiles parked on the south side of the 1000 block of East Walnut Street. (T. at 23).

What happened next is in dispute, as the only evidence comes from the testimony of Officer Fuhr and physical and circumstantial evidence which is inconsistent therewith. It is certain,

however, that Leroy Krueger's life ended as he was struck twice in the back and once in the back of the head by bullets fired by Officer Fuhr from a distance of three to four yards behind him. Officer Fuhr's testimony is that as he exited his vehicle on the driver's side, he drew his service revolver. Leroy Krueger looked up at him and the officer identified himself as a police officer and yelled for Leroy to freeze. (T. at 44-45). The officer says that Leroy pushed himself up off the pavement using his hands and then turned and ran a few steps to the south and then eastward onto the sidewalk on the south side of East Walnut Street. As Leroy rose to his feet, Fuhr saw that he did not have a knife in his hands. (T. at 46). As Leroy ran away, Fuhr chased him across the street up on the public sidewalk along the north side of East Walnut Street. As Officer Fuhr closed in on him rapidly, he held his service revolver in his right hand. At this point it was inevitable that he was going to catch Leroy. (T. at 47-50).

After he had chased Leroy approximately 210 feet, Fuhr had closed to within three to four yards. At this point, the officer states that he saw Leroy reach to the area of his right hip, along the waistband or pocket, and withdraw what he believed to be a knife. (T. at 38). Fuhr testified at his deposition that, although there was a street light shining on the area, he did not see anything shiny, he saw a knife blade silhouetted against the sidewalk. He also testified that he heard "the common noise made like when you pull a hard object like a knife or a gun or anything from a scabbard." (T. at 38-39). Leroy continued to run at full speed. He did not slow down, he did not begin to turn on the officer, he did not drop or in any way throw a knife or any other weapon, he simply continued to run. At this point, although "it was obvious that [he] was going to catch him", Officer Fuhr raised his service revolver and fired four shots into the center mass of Leroy's body, striking him twice in the back and once at the base of the skull. (T. at 49-53).

Leroy fell forward, his body coming to rest on the sidewalk. There was no knife or any other type of weapon near his body and he apparently had been unarmed when he was shot to death. Officer Fuhr, in fact, did not examine Leroy's body to determine whether a knife was present and made no search for a knife or any other weapon at the scene. (T. at 67). Approximately 1 1/2 hours after the shooting, Police Officer Greg Schaeffer, who himself had been involved in a very similar shooting previously, found a knife with an exposed blade of approximately four inches in length laying in the bushes in front of the residence at 1021 East Walnut. The knife was 43 feet, 2 inches from where the right foot of the body of Leroy Krueger came to rest on the sidewalk. (T. at 204-205). The knife fit the description of the knife described by Mr. Schmidt but was not a knife that Mr. Porter had ever known Leroy to possess. (T. at 134).

Leroy's parents, Lee Krueger and Mary Delacour, filed a civil action in the Circuit Court of Greene County, Missouri, on November 29, 1989, against the City of Springfield and Don Fuhr, seeking monetary damage pursuant to 42 U.S.C. §1983. The state court action was removed to the United States District Court for the Western District of Missouri, Southern Division, where both Defendants moved for summary judgment on all §1983 claims asserted against them. In Officer Fuhr's motion for summary judgment, he addressed the merits of Plaintiffs claim and also asserted that he was entitled to summary judgment based upon qualified immunity. Initially the trial court entered an Order on May 7, 1992, overruling both Defendants motions for summary judgment, concluding that "both the distance that the knife was found from the body, and the fact that three bullets struck Krueger in the back, create factual issues regarding the question of excessive force, which makes the case inappropriate for summary judgment." (T. at 247).

Both Defendants then filed a joint motion to set aside and reconsider the District Court's Order denying Defendants mo-

tion for summary judgment. This time the trial court granted summary judgment on all claim against the City of Springfield, but denied Officer Fuhr's motion to set aside the Court's prior Order. (T. at 263-266). Fuhr then appealed the trial court's denial of the summary judgment motion to the Eighth Circuit Court of Appeals. Although the District Court did not specifically address Officer Fuhr's claim for qualified immunity, the Eighth Circuit interpreted their brief reference to the claim for qualified immunity followed by their blanket denial of the motion for summary judgment, as a denial of the claim for qualified immunity. Accordingly, the Eighth Circuit accepted jurisdiction from a denial of a summary judgment pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Once they had accepted jurisdiction, the Eighth Circuit proceeded to decide the case on its merits, never reaching the issue of qualified immunity. On April 9, 1993, the Eighth Circuit reversed and remanded the case to the District Court for entry of summary judgment on behalf of Officer Fuhr. In a decision that is replete with assumptions that Officer Fuhr did, in fact, believe that Leroy had pulled a knife, the Court determined that Officer Fuhr's actions were objectively reasonable for the purposes of the Fourth Amendment. Petitioners petitioned the Eighth Circuit for a rehearing of the case and on June 1, 1993, the Eighth Circuit entered its Order denying said petition.

## REASONS FOR GRANTING THE WRIT

### I. The Court of Appeals failed to consider all facts in a light most favorable to the non-moving party in an appeal from the denial of a motion for summary judgment.

The Court of Appeals recognized that since it was presented with a summary judgment motion, "the Court must determine whether any factual issues exist that may reasonably be resolved in favor of either party. . . . In making this determination, the Court must view the facts in the light most favorable to the non-moving party, giving such party the benefit of all reasonable inferences to be drawn from the facts." *Krueger v. Fuhr*, 991 F.2d 435, 438 (8th Cir. 1993). Furthermore, the Court acknowledged that their exists a dispute as to whether or not Leroy Krueger was armed at the time he was shot and whether he had committed any crime. *Id.* at 439.

However, in the body of its analysis, the Court of Appeals views these facts other than in the light most favorable to Petitioners. Specifically, the Court of Appeals assumed that "Leroy Krueger pulled, or seemed to pull, a knife from his waistband." *Id.* The Court also determined that "use of deadly force was necessary to prevent escape," *Id.* at 440, despite the fact that the officer's deposition testimony is replete with references to the fact that he was "gaining on" and about to catch Leroy at the time of the shooting. In fact, Officer Fuhr only contends that he resulted to deadly force to avoid being stabbed and never once indicates that he did so to prevent escape. (T. at 50).

Although Officer Fuhr testified that Leroy pulled a knife from his waistband, the record contains an abundance of evidence that is contradictory thereto. There was evidence available to the Court of Appeals that Leroy did not have a knife in his possession at the time he was being chased, (T. at 45); that the knife found

approximately 43 feet from his body was not the knife that had been given to him by Michael Allen Porter (T. at 134), that the knife was found approximately 1 1/2 hours after the shooting by an officer who himself had been involved in a similar shooting previously; (T. at 68-69); that Officer Fuhr never looked for a knife or any weapon on or near the body of Leroy Krueger after shooting him, (T. at 66-67); and that Officer Fuhr never observed Leroy throw or in any way dispose of a knife or any other weapon. (T. at 54).

All of these contradictory facts must be viewed in the light most favorable to the Petitioners, as the non-moving parties. Essentially, when this rule of construction is followed, the Court must presume that Leroy did not have a knife at the time he was shot, that the Officer could not reasonably have thought that a knife had been pulled, and that despite the fact that he was about to catch Leroy, Officer Fuhr fired four shots into his back. The explanation for the presence of a knife in the general, but not immediate area, some time after the shooting, is a question for a jury which cannot be presumed in the context of a motion for summary judgment. The ultimate issue in this case is whether or not Officer Fuhr acted reasonably within the context of the Fourth Amendment when he shot and killed Leroy Krueger. When the underlying facts discussed above are viewed in a light most favorable to Mr. Krueger and Ms. Delacour, it is clear that this ultimate fact is in dispute. Accordingly, summary judgment for Officer Fuhr is not appropriate.

## II. The Court of Appeals erred in finding that their is no material fact in dispute as to whether or not Respondent police officer acted reasonably in using deadly force to stop the decedent from fleeing, where the officer had probable cause to believe the suspect had committed a dangerous felony, where the officer had an opportunity to otherwise apprehend the suspect, and where there is a dispute of fact as to whether the suspect was armed or whether the officer believed him to be armed.

This case involves a claim of excessive force by a police officer and is properly analyzed under the Fourth Amendment to the United States Constitution. The standard is one of "objective reasonableness". *Graham v. Connor*, 490 U.S. 386 (1989). Application of this standard to cases involving the use of deadly force by a police officer to apprehend a fleeing suspect, is governed by *Tennessee v. Garner*, 471 U.S. 1 (1985). The *Garner* case involved a police officer in pursuit of an unarmed, non-dangerous burglary suspect. As the suspect began to climb over a fence that would inevitably lead to his escape, the officer shot and killed him. In defending the §1983 action brought by the suspect's father, the officer relied on a Tennessee statute which authorized the use of deadly force any time a suspect continues to flee or forcibly resist after an officer expresses his intention to make an arrest.

The Court determined that the statute was invalid and began to analyze the case under the Fourth Amendment, declaring that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7. Determining the constitutionality of such a seizure requires the Court to "balance the nature and quality of the intrusion on the individuals Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Id. citing U.S. v. Place*, 462 U.S. 696, 703 (1983). The Court then analyzed the

extent of the intrusion; declaring that "[the] intrusiveness of a seizure by means of deadly force is unmatched. The suspects fundamental interest in his own life need not be elaborated upon." *Id. at 9*. The competing government interest of effective law enforcement is not sufficient to justify the killing of non-violent suspects. "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id. at 11*.

In *Garner*, the Court enunciated that it is not constitutionally unreasonable to prevent escape by deadly force; "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. The Court then set out two distinctive tests to determine when an officer has such probable cause. The first of these disjunctive tests is; "if the suspect threatens the officer with a weapon". The second situation when such probable cause exists is when "there is probable cause to believe that [a suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm" and deadly force is "necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* Clearly, the *Garner* test requires that a Court, in reviewing the use of deadly force by a police officer, to make factual determinations regarding each of the elements enunciated in the tests set forth above. *See Washington v. Newsom*, 977 F.2d 991, 994-995 (6th Cir. 1992). In the case at hand, the Court of Appeals erred in failing to make these factual determinations pursuant to Federal Rule of Civil Procedure 56(c), (*See discussion in section 1 of this petition*), and in determining certain crucial facts to be immaterial.

Of the four factual determinations required by the *Garner* test, two are not disputed. Petitioners concede that Officer Fuhr gave Leroy the feasible warnings and that he had probable cause to believe Leroy had committed a crime involving the threatened infliction of serious physical harm. Although there has been no

opportunity for a jury to assess the credibility of his testimony, Officer Fuhr's contention that he ordered Leroy to freeze is not contradicted by any other evidence. Additionally, although it is disputed whether or not Leroy had actually committed a crime or possessed a knife, it is certain that Officer Fuhr received radio transmittals describing Leroy, referring to his physical locations and stating that he was suspected of threatening someone with a knife. However, the existence of these facts do not make Fuhr's actions constitutionally reasonable as set out in *Garner*. The remaining necessary factual determinations; whether or not Leroy threatened the officer with a weapon and whether or not deadly force was necessary to prevent his escape, are in dispute.

Ignoring all of the factual evidence that exists to contradict the police officers contention that he believed Leroy to have pulled a knife, the Court of Appeals found that, based upon the existence of the probable cause discussed above, "[it] was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." *Krueger v. Fuhr*, 991 F.2d 435, 439 (8th Cir. 1993). The Court of Appeals then proceeded to determine that all of the facts which could lead a reasonable fact finder to determine that Leroy was not armed at the time of shooting, were not material, because "[we] have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable." *Id.*

Finally, the Court of Appeals reached the question of whether the use of deadly force was necessary to prevent escape. The Court again ignored the facts contradictory to Officer Fuhr's contention that he saw a weapon, and found that his use of deadly force was necessary to prevent escape because, "the Fourth Amendment does not require police officers to forego the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later ap-

prehend the fleeing suspect." *Id. at 440.* This determination is made despite the existence of several other police officers in the immediate area and Fuhr's own testimony that he was three or four yards away from Leroy and would inevitably have caught him.

Essentially, the Court has determined that the existence of probable cause that the suspect has committed a crime involving the threatened infliction of physical harm establishes that the officer will have a reasonable belief that his life is in danger. This, in turn, establishes that use of deadly force will be necessary even if there are obvious other means of apprehending the suspect. This bootstrap analysis flies in the face of the Supreme Court's statement in *Garner* that the use of deadly force to stop a fleeing suspect under any circumstances, is constitutionally unreasonable. *See Garner*, 471 U.S. at 11. As a practical matter, the Court of Appeals decision means that any officer with probable cause to believe that he is on the trail of a suspect who has committed a crime involving the threatened infliction of harm, can ignore the absence of a weapon or any other threat by the suspect, and shoot the suspect dead. This standard would apply in situations where the suspect was on the verge of escape as well as situations where the suspect can easily be otherwise detained, including a situation of surrender.

In *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992), the Sixth Circuit Court of Appeals addressed this issue more prudently. The case involved a police officer who was in pursuit of a vehicle whose occupants had used a "long black gun" to commit a series of robberies. The officers located the vehicle and observed the suspects in their car as they attempted to commit another armed robbery. The officer saw the passenger lean out of the vehicle and point a gun at the intended victim. The officers moved in on the vehicle and were fired at by its passenger. As gunfire was exchanged, the vehicle's driver exited and attempted to flee from the scene. As he was running, the Defendant police officer shot him numerous times. It was later determined that he was unarmed. The deceased suspect's family filed a §1983 action in

the United States District Court for the Eastern District of Michigan. The officer moved for summary judgment, which was denied by the District Court based on the existence of disputed facts which were material to the determination of the officers reasonableness. The officer appealed the denial of summary judgment based on qualified immunity, to the Sixth Circuit Court of Appeals.

There the Court recognized the summary judgment standard enunciated in Federal Rule of Civil Procedure 56(c), and the factual determinations required by the *Garner* test. *Id. at 993-995*. The Court determined that; "although we believe the answers to some of the questions we have posed may be favorable to the Defendants, . . . We may not decide as a matter of law the issue of whether a reasonable officer could have believed his actions were lawful." This determination is based on the Court's view of the factual disputes and its determination that, "[r]easonable finders of fact might disagree as to whether, at the time of the flight, an objective police officer should have perceived [the suspect] as 'unarmed' or 'non-dangerous', particularly in view of the number of police officers present." *Id. at 995*. Based upon the existence of factual disputes similar to those in the case at hand, the Sixth Circuit Court of Appeals affirmed the denial of the Defendant officer's motion for summary judgment and remanded the case to the District Court to proceed to trial. A similar disposition would be proper in this case. The facts which are in dispute, whether Leroy possessed a knife or Officer Fuhr could have reasonably believed that he pulled a knife, and whether or not the use of deadly force was necessary to apprehend Leroy, should be decided by a jury.

All of the elements of the tests set out in *Garner* must be properly analyzed before a Court of Appeals can determine whether or not a police officer's use of deadly force is reasonable. When a suspect threatens an officer with a weapon, the officer's safety is obviously in question making it reasonable for

that officer to use deadly force. Whether or not Leroy Krueger threatened Officer Fuhr with a weapon is in dispute. The test is not "when an officer reasonably believes he is threatened", but only when he "is threatened". However, the facts that exist; that Leroy did not have a knife or any weapon in his possession at the time Officer Fuhr saw him get up and start to run, the discrepancy in the identity of the knife, the location where a knife was eventually found, the prior history of the officer who found the knife, Officer Fuhr's lack of investigation or search for a weapon following the shooting, and the officer's vague testimony of how he saw and heard a knife, could lead a reasonable trier of fact to determine that he could not have reasonably believed Leroy Krueger to have been armed or dangerous at the time he killed him. Leroy Krueger's parents must be given the opportunity to have a jury make this determination.

Independent of the facts discussed previously, the fact that Leroy was shot in the back itself raises a genuine issue of material fact as to whether or not the officer was threatened with a weapon. *See Samples on behalf of Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988). Accordingly, the first prong of the *Garner* test has not been established.

When an officer has probable cause to believe a suspect has committed a crime involving the use or threatened use of violence, he also is reasonable in using deadly force to prevent that suspect from escaping. The rationale of the *Garner* court in establishing this test is that an officer who has such a probable cause is reasonable in determining that the suspect is dangerous and poses a threat to the officer or others if allowed to escape. Therefore, the officer should give warnings where feasible and then may use deadly force to prevent escape. However, such force can only be used if it is "necessary to prevent escape". The fact that the Supreme Court included the requirement of necessity is indicative that such necessity must exist independent of

the probable cause. It cannot be imputed from the probable cause as the Court of Appeals has attempted to do in the case at hand.

There is a genuine dispute as to whether or not deadly force was necessary to prevent Leroy's escape. In fact, Officer Fuhr asserts that he employed deadly force to protect himself from a weapon that he believed Leroy had drawn. At no time has Officer Fuhr contended that deadly force was necessary to prevent Leroy's escape. At the time of the shooting, the officer was three to four yards behind Leroy and was gaining rapidly. It was inevitable that he was going to catch Leroy. (T. at 50). *Compare Ryder v. City of Topeka*, 814 F.2d 1412, 1416 (10th Cir. 1987) (Deadly force necessary to prevent escape of suspect who was over fifty feet from the officer, and about to run around the building into a darkened residential area), and *Wright v. Whiddon*, 747 F.Supp. 694, 697 (M.D. GA. 1990) (Genuine dispute as to the need for deadly force to prevent escape of suspect who was unarmed and on the threshold of eluding immediate capture.). The above facts could lead a reasonable trier of fact to determine that deadly force was not necessary to prevent Leroy Krueger's escape and, accordingly, the second prong of the *Garner* test has not been established.

## CONCLUSION

The Eighth Circuit Court of Appeals has misapprehended the substantive law set down in *Tennessee v. Garner*, 471 U.S. 1 (1985), in determining that the Respondent police officer acted reasonably, as a matter of law, when he shot and killed Leroy Krueger. The test set out by the Supreme Court requires a number of factual determinations which must exist independently. One cannot be imputed from the other. Facts which are essential to determining whether or not Officer Fuhr acted reasonably within the context of the Fourth Amendments "objective reasonableness" standard, remain in dispute. The Eighth Circuit's independent resolution of these disputes and determination that the unresolved disputes were immaterial, is in direct conflict with the Sixth Circuit's deference to the trier of fact in *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992). To resolve this dispute between Circuits and to clarify the *Garner* tests for determining whether or not a police officer's use of deadly force upon a fleeing suspect is objectively reasonable within the context of the Fourth Amendment, the Writ should be granted.

Respectfully submitted,

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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2427

Lee Krueger and Mary Delacour,
Appellees,

vs.

Don Fuhr,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: January 15, 1993
Filed: April 9, 1993

Before RICHARD S. ARNOLD, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and HAMILTON,* District Judge.

HAMILTON, District Judge

Don Fuhr, a Springfield, Missouri police officer, appeals from the district court's[1] denial of his summary judgment motion. We reverse.

### I.

In the early morning hours of June 6, 1989, Officer Don Fuhr was on patrol duty. By radio transmission, Officer Fuhr was

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* The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri, sitting by designation.

[1] The Honorable James C. England, United States Magistrate Judge for the Western District of Missouri, presiding by consent of the parties pursuant to 28 U.S.C. § 636(c) (1988 & Supp II 1990).

informed that an assault had occurred at the Tri-States Laundry and that the suspect was a "white/male wearing black shirt with number 12 on it and bluejeans," and "will be armed with a knife." (Joint Appendix at 195). The dispatcher also stated that canine security was possibly in pursuit of the suspect. A subsequent radio transmission indicated that the suspect's name was Leon Krueger and that he was possibly an escapee from Alpha House, a residential halfway house in Springfield, Missouri. (Joint Appendix at 198). Another officer communicated the suspect's probable location and stated that he was "suppose [sic] to be on drugs and very high and had some type of knife on him." (Joint Appendix at 199). Shortly thereafter, a second officer announced that the suspect had probably been spotted in the 1000 block of East Walnut.

Responding to this information, Officer Fuhr drove his police vehicle onto East Walnut. There he observed an individual fitting the description of the Tri-States Laundry assailant lying on his stomach between two parked automobiles. This individual was later identified as Leroy Krueger. Officer Fuhr exited his police vehicle, drew his service revolver, identified himself as a police officer and ordered Krueger to freeze. At that time, Leroy Krueger did not have a knife in his hand nor did Officer Fuhr notice a knife anywhere on Krueger's person.

Leroy Krueger began running down East Walnut and Officer Fuhr chased him for approximately 210 feet. Several times during this pursuit, Officer Fuhr ordered Krueger to freeze. When the officer had closed to within 3 to 4 yards of Krueger, he saw Krueger reach to the area of his right hip. He heard the sound of an object being pulled from Krueger's waistband area. Officer Fuhr testified at his deposition that Krueger pulled a knife from his waist band and was gripping it in his fist.

Officer Fuhr further testified that he believed that Krueger was going to turn and attack him with the knife. Officer Fuhr had

been running "as fast as [he] could run" (Joint Appendix at 48) and was fearful that he would be unable to stop in time to avoid the attack. Officer Fuhr slowed down, leveled his service revolver and fired four rounds at the center mass of Leroy Krueger's body. Two rounds struck Leroy Krueger in the back, a third round hit him in the base of the skull. Leroy Kruger died as a result of the wound to the base of the skull. During the subsequent investigation, a Springfield police officer found a knife with an exposed blade approximately 43 feet from the point where Krueger's right foot came to rest on the sidewalk.

Pursuant to 42 U.S.C. §1983 (1988), Lee Krueger and Mary Delacour, the natural parents of Leroy Krueger, filed this action for monetary damages against Don Fuhr and the City of Springfield. Plaintiffs allege that Office Fuhr violated their son's Fourth and Fourteenth Amendment rights by using excessive force when he shot and killed Leroy Krueger. On May 7, 1992, the trial court entered an order denying motions for summary filed by Don Fuhr and the City. Upon reconsideration, the trial court entered summary judgment in favor of the City of Springfield but reaffirmed its denial of Don Fuhr's summary judgment motion. On appeal, Don Fuhr contends that the district court erred when it found that genuine issues of material fact precluded entry of summary judgment and, in the alternative, that the court erred when it denied Office Fuhr's claim of qualified immunity.

## II.

The district court has yet to enter its final judgment in this case. However, denial of a claim of qualified immunity is an appealable final decision within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). It is true that in *Moutray v. Butts,* No. 92-1745 (8th Cir. Feb. 8, 1993), this court declined to review a denial of summary judgment where the district court failed to explicitly address the defendant's claim of qualified immunity. While the district court opinions in the

instant case focused on the merits of the defendants' summary judgment motions and did not set forth the court's rationale in denying Defendant Fuhr's claim of qualified immunity, this court is satisfied that the district court did in fact deny Defendant Fuhr's summary judgment motion both on the merits and on qualified immunity grounds.[2] Therefore, we conclude that we have jurisdiction to consider this appeal. Moreover, on appeal from a denial of qualified immunity this court has jurisdiction to resolve the case on the merits. *Gometz v. Culwell,* 850 F.2d 461, 463 (8th Cir. 1988).

Summary judgment is appropriate when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). When presented with a summary judgment motion, the court must determine whether any factual issues exist that may reasonably be resolved in favor of either party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The substantive law determines which facts are relevant and which are immaterial. Only disputes that might affect the outcome will properly preclude summary judgment. *Id.* at 248; *Get Away Club, Inc. v. Coleman,* 969 F.2d 664, 666 (8th Cir. 1992). In making this determination, the court must view the facts in the light most favorable to the non-moving party, giving such party the benefit of all reasonable inferences to be drawn from the facts. *St. Paul Life & Marine Inc. Co. v. Federal Deposit Ins. Corp.,* 968 F.2d 695, 699 (8th Cir. 1992).

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[2] The District Court's opinion discusses only Fuhr's defense "on the merits," and not his qualified immunity defense. But the Court notes that Fuhr's motion for summary judgment asserts the defense of qualified immunity, and its opinion then denies the motion without qualification. We read this as a rejection of qualified immunity, notwithstanding the opinion's failure to discuss the issue explicitly. However, we take this opportunity to suggest that district court clearly address the qualified immunity issue.

## III.

The Fourth Amendment protects citizens from unreasonable search and seizure.[3] There is no question but that Officer Fuhr's actions constituted a seizure within the meaning of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Thus, the issue before the court is whether Officer Fuhr's use of deadly force to apprehend LeRoy Krueger was reasonable within the meaning of the Fourth Amendment.

It is well settled that police officers may use some degree of force in effecting a lawful arrest. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Determining whether the use of force is reasonable in any given instance requires careful balancing of " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.' " *Garner*, 471 U.S. at 8 (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)). The use of deadly force is constitutionally reasonable in certain limited circumstances:

> Where the office has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or other, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

*Garner*, 471 U.S. at 11-12. *See also Ryder v. Topeka*, 814 F.2d 1412, 1419 (10th Cir. 1987) (fleeing suspect poses threat of

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[3] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . U.S. Const. amend. IV.

serious harm when he places officer in dangerous life-threatening situation or is fleeing from the commission of inherently violent crime). An officer's compliance with this standard must be assessed from the point of view of a reasonable officer on the scene. *Graham,* 490 U.S. at 396.

On appeal, Officer Fuhr contends that the district court erred when it held that the distance the knife was found from Krueger's body and the fact that the bullets struck Krueger in the back create genuine issues of material fact. Officer Fuhr maintains, and we agree, that these facts are not material to a determination of whether the shooting was objectively reasonable.

It is undisputed that, at the time he first encountered Leroy Krueger, Officer Fuhr knew that a man fitting Krueger's description was suspected of committing an armed assault at the Tri-States Laundry. It is also undisputed that Officer Fuhr had been informed that the suspect was fleeing from police and was believed to be on East Walnut. Under those circumstances, it was objectively reasonable for Officer Fuhr to believe that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm. Furthermore, Officer Fuhr also knew that the suspect probably had a knife and was inebriated. It was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband.

Lee Krueger and Mary Delacour maintain that there is a genuine factual dispute as to whether their son actually had a knife at the time of the shooting. In support of this contention, Plaintiffs note that the knife was found approximately 43 feet from Krueger's right foot. They also suggest that the sound of a knife being pulled from a waistband is insufficiently loud or distinctive to be identified over the sound of running footsteps. Finally, Plaintiffs note that Officer Fuhr testified that the knife

appeared to be the same color as Leroy Krueger's hand. Plaintiffs conclude that a reasonable fact-finder could determine on the basis of this evidence that Krueger was not armed at the time of the shooting.

Plaintiffs misapprehend the nature of the Fourth Amendment reasonableness inquiry. Reasonableness must be determined from the point of view of a reasonable officer in the situation, "rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. An erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable. *Id.* We have already concluded that Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable. Therefore, even assuming that Plaintiffs were able to establish that Krueger was unarmed at the time of the shooting, that fact would not preclude entry of judgment for Officer Fuhr.

Nor is the fact that Leroy Krueger was shot in the back sufficient to establish a genuine issue of fact regarding the reasonableness of Officer Fuhr's actions. Plaintiffs rely on *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328 (11th Cir. 1988) for the proposition that a wound in the back raises serious issues of material fact regarding the use of excessive force. In *Samples*, the court of appeals reversed the district court's entry of summary judgment for the police officer in an excessive force case. The court determined that the evidence, including the fact that one of the six shots the officer fired hit plaintiffs' decedent in the back, raised serious factual disputes regarding the use of excessive force.

However, *Samples* is distinguishable from the instant case. The defendant officer in *Samples* claimed that his use of force was reasonable because the victim had been advancing on him with a knife when the shots were fired. The court determined that while it was possible to reconcile the officer's story with the

physical evidence, the evidence also supported other contradictory explanations of the events leading up to the shooting. In the instant case, there is no evidence that requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back. As Officer Fuhr notes, it is not remarkable that an escaping felony suspect would be shot in the back.

The second prong of the *Garner* test is whether the use of deadly force was necessary to prevent escape. It is undisputed that Krueger was fleeing police apprehension at the time of the shooting. *Compare Daniels v. Terrell,* 783 F.Supp. 1211 (E.D.Mo. 1992) (officer's use of deadly force objectively reasonable when plaintiff fired on officer and was running from police) *with Fitzgerald v. Patrick,* No. 88-0499-CV-W-5, 1990 U.S. Dist. LEXIS 1406. (W.D. Mo. Feb. 5, 1990) (suspect in trailer surrounded by police officers was not fleeing). It is true that other police officers were in the general area and it is possible, though not certain, that another officer might have apprehended Krueger if he eluded Officer Fuhr's foot pursuit. However, the Fourth Amendment does not require police officers to forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect. *See e.g. Fraire v. Arlington,* 957 F.2d 1268, 1276 (5th Cir.) *cert. denied* 113 S.Ct. 462 (1992) (use of deadly force to prevent officer's own death or serious bodily harm was justified); *Reese v. Anderson,* 926 F.2d 494, 501 (5th Cir. 1991) (where suspect reached several times for firearm, officer justified in using deadly force to defend himself and others even where suspect "totally surrounded" by police officers). Thus, we conclude that Officer Fuhr's use of deadly force was necessary to prevent escape in accordance with the standards enunciated in *Garner.*

Finally, *Garner* requires the officer to give a warning "where feasible." Officer Fuhr ordered Krueger to freeze when he first encountered Krueger lying between two cars on East Walnut

Street, and several times during the pursuit. There is no evidence that he gave a warning immediately prior to the shooting. However, we are satisfied that under the urgent circumstances facing Officer Fuhr, the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable.

Because we conclude that Officer Fuhr's actions were objectively reasonable and therefore did not violate Leroy Krueger's Fourth Amendment rights, it is not necessary to reach Appellant's contention that the district court erred when it denied his claim of qualified immunity.

## IV.

We reverse and remand to the district court for entry of summary judgment in favor of Don Fuhr.

A true copy.

Attest:

CLERK: U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 89-3445-CV-S-4

LEE KRUEGER and MARY DELACOUR,
Plaintiffs,

v.

DON FUHR and CITY OF SPRINGFIELD, MISSOURI,
Defendants.

### ORDER

[Filed: May 7, 1992]

This matter comes before the Court on Defendants' Motions for Summary Judgment. For the reasons set forth herein, the Summary Judgment Motions will be overruled.

A motion for summary judgment will be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). In determining whether a genuine issue regarding a material fact exists, the pleadings must be construed in favor of the non-moving party. The non-movant must, however, resist a summary judgment motion by setting forth specific facts that show there is a genuine issue of fact for trial. Fed. R. Civ. P. 56(e); *Burst v. Coors,* 650 F.2d 930, 932 (8th Cir. 1981). The motion may then be granted only if there is no substantial evidence in support of that party's position. *Thibodaux v. Atlantic Richfield Co.,* 580 F.2d 841, 844 (5th Cir. 1987), *cert. denied,* 442 U.S. 909

(1979). While summary judgment is an extreme remedy, the Court must recognize its salutary purpose to avoid a useless, expensive, and time-consuming trial where there is no genuine, material issue to be tried. *Anderson v. Viking Pump Div.*, 545 F.2d 1127, 1129 (8th Cir. 1979).

A brief statement of the facts of this case is as follows: LeRoy Krueger (hereinafter "Krueger"), a Missouri state parolee who had absconded from supervision, entered onto the premises of the Tri-States Laundry Service, where he had been employed. An employee of the laundry, Robert Christy, claims that he saw Krueger with a knife in his hand with a four-inch blade. An altercation ensued, the facts of which are in dispute. According to Christy, Krueger verbally threatened him, scratched his car with the knife, and the police were called. According to Michael Porter, Krueger's cousin, Krueger called him and told him that Christy had been chasing him and hit him with a car. Defendant Don Fuhr, who was on patrol duty, heard the information of his police radio, describing Krueger, his attire, location, and the fact that he had a knife. While enroute to the Laundry, Fuhr received additional information by radio that Krueger was believed to be an Alpha House escapee, Leon Krueger, and was possibly on drugs and very high. He then received radio information regarding the suspect's location. As Fuhr approached that location, he observed the suspect lying on the pavement between two automobiles. He approached Krueger, drew his service revolver, identified himself as a police officer, and allegedly yelled for Krueger to freeze. Krueger got up, and began to run away. The officer did not see a knife. He claims to have tried unsuccessfully to trip Krueger, whereupon the suspect continued to flee. The pursuit continued, with the officer shouting for the suspect to freeze more than once, for about 210 feet, according to Fuhr. The officer claims to have been running as fast as he could, that he was about 3 to 4 yards behind Krueger, and that he saw him reach his hand to the area of his right hip, along the waistband or pocket, and withdraw an object. Fuhr states that he

heard the sound of an object being pulled from the suspect's waistband that sounded like metal against leather, and then saw a knife blade in Krueger's fist, silhouetted against the pavement. Believing that he was in immediate danger, and fearing that he would not be able to stop if Krueger turned on him with the knife, the officer fired four rounds at Krueger, striking him twice in the back and once in the base of the skull, and missing with one round. A knife, fitting the description given by witnesses, was found 43 feet from Krueger's body. An autopsy revealed that the shot to the base of the head killed Krueger, and that his blood alcohol level was between 0.19 and 0.214 at the time of his death.

It is Defendant Fuhr's position that he is entitled to summary judgment because his use of deadly force to apprehend a fleeing felon armed with a deadly weapon was reasonable. He also contends, alternatively, that he is entitled to qualified immunity because his actions did not violate any clearly established law. Defendant City of Springfield asserts that the use of deadly force was reasonable, and that Plaintiffs have failed to plead and prove the existence of an unconstitutional policy, custom or procedure that is attributable to the City, and have failed to establish that a policy or custom of the City was the proximate cause of a constitutional deprivation to Krueger.

Defendants contend that all Officer Fuhr knew at the time the shots were fired was that he was chasing a violent escaped felon, reportedly high on drugs or alcohol, who had assaulted individuals with a knife a few minutes earlier. They argue that Fuhr was confronted with a situation requiring split-second decision making, that Krueger had refused to halt and was avoiding apprehension, and that he pulled a knife when the officer was dangerously close to him. Therefore, deadly force was reasonable under the circumstances.

Plaintiffs argue that the mere fact that Krueger was shot in the back raises an issue of fact that precludes summary judgment.

They point out that Fuhr had admitted in his deposition that the sound he heard was similar to that made by a hand against pants. Plaintiffs assert that the sound had to have been heard over the sound of footsteps and any any heavy breathing occurring during the pursuit. They also suggest that the silhouette might have been produced by Krueger's open right hand. Plaintiffs contends that the evidence is not clear that Krueger was armed with a knife at the time he was shot, and that even if he had been, the officer was in no immediate danger unless Krueger turned on him. They assert that Krueger had no opportunity to throw the knife after he was shot, and that the knife was not found where it might be expected in relationship to his body had he been holding it as Fuhr alleges. Plaintiffs also contend that defendant City of Springfield is not entitled to summary judgment because the city had a policy that permitted Fuhr to shoot Krueger in the back without a showing of imminent danger to the officer or others.

After carefully reviewing the record in the light most favorable to plaintiffs, the Court finds that we cannot rule, as a matter of law, that there are not genuine factual issues regarding the reasonableness of Defendant Fuhr's actions. Both the distance that the knife was found from the body, and that fact that three bullets struck Krueger in the back, create factual issues regarding the question of excessive force, which makes the case inappropriate for summary judgment. It appears to the Court, that based on the evidence before us and the reasonable inferences that can be drawn therefrom, there exists a question regarding the reasonableness of Defendant Fuhr's response. *See Graham v. Conner*, 409 U.S. 386 (1989) (holding that the reasonableness inquiry in excessive force cases involves examination of the question of whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them). For the same reasons, it cannot be said as a matter of law that Defendant City of Springfield's policy and training regarding the amount of force to be used under these circumstances did not violate the constitutional rights of Krueger.

Because plaintiffs have set forth specific facts showing that there may be a genuine issue for trial, defendants are not entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(e).

For the foregoing reasons, pursuant to 28 U.S.C. Section 636(b)(1) and Local Rule 22, it is therefore

ORDERED that the defendants' motions for summary judgment be, and are hereby, overruled.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 5/7/92

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

Case No. 89-3445-CV-S-4

LEE KRUEGER and MARY DELACOUR,
Plaintiffs,

v.

DON FUHR and CITY OF SPRINGFIELD, MISSOURI,
Defendants.

**ORDER**

[Filed: June 10, 1992]

Defendants have filed a joint motion to set aside and reconsider this court's order denying Defendants' motion for summary judgment.

In the Order denying Defendants' summary judgment motion, this court held that we cannot rule, as a matter of law, that there are not genuine factual issues regarding the reasonableness of Defendant Fuhr's actions, relying on *Graham v. Conner,* 490 U.S. 386 (1989). Defendants contend that, to the extent that the court based its ruling on the "objective reasonableness test" stated in *Graham,* the court has applied the wrong test.

Having carefully scrutinized the case law that has evolved since the Supreme Court decided *Graham,* the court is confident that the correct test was applied in this case. Since the *Graham* decision, whether an officer used excessive force has been governed by the "objective reasonableness" standard of the Fourth Amendment. *Hunter v. District of Columbia,* 943 F.2d 69, 76 (D.C. Cir. 1991); *Curnow v. Ridgecrest Police,* 952 F.2d 321 (9th Cir. 1991); *Hopkins v. Andaya,* No. 89-16368, 1992 U.S. App. LEXIS 5024 (9th Cir. Mar 24, 1992).

In *Graham*, the Court explained that it was "mak(ing) explicit what was implicit" in *Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985), that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395 (emphasis in original). The Court recognized that standard is not capable of "precise definition or mechanical application." *Id.* at 396. Rather, the court must consider all of the facts and circumstances of each case, including the severity of the crime occasioning the arrest, whether the suspect posed an immediate threat to the safety of the officer or anyone else, and whether he actively resisted arrest or attempted to flee. *Id.* While the court should avoid reliance upon hindsight and should take into consideration the officer's need to make split-second judgments at the time he acted, the test is, in the end, still the objective reasonableness of his conduct. *Id.*

A recent Ninth Circuit case demonstrates the application of *Garner* and *Graham* in a case where an individual was killed by a police officer, and the appellate court affirmed the district court's denial of summary judgment. *Curnow*, 952 F.2d at 324-25. The facts of the case involved the police investigating a domestic situation where they found the decedent allegedly slapping a woman, and observed him with a rifle. The police attempted to break down the door, got into the house, yelled "freeze, police," and when the decedent raised his weapon, an officer shot and seriously wounded him. *Id.* at 323. The decedent then attempted to exit the house, and turned and pointed the weapon at officer, at which time he was shot and killed. The woman's statement was that the decedent was not hitting her, that he did not reach for his gun before the police shot him, and that it appeared he had been shot in the back by the first shot. She also stated that the gun was not loaded, and that the decedent had grabbed it by the muzzle as he attempted to flee. *Id.* The court

held that, "(u)nder (her) version of the shooting, the police officers could not reasonably have believed the use of deadly force was lawful because (decedent) did not point the gun at the officers and apparently was not facing them when they shot him the first time. Thus, viewing the evidence in the light most favorable to the nonmoving party, the defendants-appellants are not entitled to qualified immunity." *Id.* at 325.

Based on the facts as they have been presented in this case, the Court is confident that the ruling denying the summary judgment motion for Defendant Fuhr was appropriate. We make this ruling cognizant that the factual conflicts might be resolved in Defendant Fuhr's favor at trial, but it is not our job to resolve these conflicts on a motion for summary judgment. *Hopkins*, LEXIS 5024, at *17.

Defendant City has more fully articulated its position in its motion to reconsider the court's order denying summary judgment, emphasizing that Standard Operating Procedure No. 400 completely incorporated the language of *Garner*, and that police officers are trained to shoot at center body mass only in situations in which the officer is authorized to discharge his firearm in accordance with that procedure. It is true, as Defendant City has reiterated, that Plaintiffs have not raised a genuine, material factual issue regarding how the City's policy or training does not comply with constitutional requirements. According, the court finds it appropriate to set aside its order and grant summary judgment for Defendant City.

It is therefore

ORDERED the Defendant City's motion to set aside the court's order be, and is hereby, granted. Accordingly, it is further

ORDERED that Defendant City's motion for summary judgment be, and is hereby, granted. It is further

ORDERED that Defendant Fuhr's motion to set aside the court's order be, and is hereby, denied.

/s/ James C. England
JAMES C. ENGLAND
United States Magistrate

Date: 06/10/92

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2427WMS

Lee Krueger and Mary Delacour,
Appellees,

vs.

Don Fuhr,
Appellant.

Appeal from the United States District Court
for the Western District of Missouri

The petition for rehearing by the panel is denied

June 1, 1993

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
OCT - 6 1993
OFFICE OF THE CLERK

No. 93-357

In The

# Supreme Court of the United States

October Term, 1993

LEE KRUEGER AND MARY DELACOUR,

*Petitioners,*

vs.

DON FUHR,

*Respondent.*

**On Petition For Writ of Certiorari To The United States Court Of Appeals For the Eighth Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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## COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals followed the substantive law established in *Tennessee v. Garner*, 471 U.S. 1 (1985), in sustaining Respondent's Motion for Summary Judgment on the basis that the Respondent police officer's use of deadly force to apprehend a fleeing suspect was objectively reasonable within the meaning of the Fourth Amendment, where Respondent police officer had probable cause to believe the suspect had committed a dangerous felony involving the threatened infliction of serious physical harm, the Respondent officer reasonably believed the suspect was armed with a knife and posed a threat of serious physical harm to the officer or others, and the use of deadly force was necessary to prevent the suspect's escape.

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No. 93-357

In The

# Supreme Court of the United States

October Term, 1993

LEE KRUEGER AND MARY DELACOUR,

*Petitioners,*

vs.

DON FUHR,

*Respondent.*

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Eighth Circuit

## BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

*May it Please the Court:*

## COUNTER STATEMENT OF THE CASE

### Summary of Facts

Although Petitioners have set forth their view of the case, the United States Court of Appeals for the Eighth Circuit objectively found the facts to be as follows:

> In the early morning hours of June 6, 1989, Officer Don Fuhr was on patrol duty. By radio transmission, Officer Fuhr was informed that an assault had occurred at the Tri-States Laundry

and that the suspect was a "white/male wearing black shirt with number 12 on it and bluejeans," and "will be armed with a knife." (Joint Appendix at 195). The dispatcher also stated that canine security was possibly in pursuit of the suspect. A subsequent radio transmission indicated that the suspect's name was Leon Krueger and that he was possibly an escapee from Alpha House, a residential halfway house in Springfield, Missouri. (Joint Appendix at 198). Another officer communicated the suspect's probable location and stated that he was "suppose [sic] to be on drugs and very high and had some type of knife on him." (Joint Appendix at 199). Shortly thereafter, a second officer announced that the suspect had probably been spotted in the 1000 block of East Walnut.

Responding to this information, Officer Fuhr drove his police vehicle onto East Walnut. There he observed an individual fitting the description of the Tri-States Laundry assailant lying on his stomach between two parked automobiles. This individual was later identified as Leroy Krueger. Officer Fuhr exited his police vehicle, drew his service revolver, identified himself as a police officer and ordered Krueger to freeze. At that time, Leroy Krueger did not have a knife in his hand nor did Officer Fuhr notice a knife anywhere on Krueger's person.

Leroy Krueger began running down East Walnut and Officer Fuhr chased him for approximately 210 feet. Several times during this pursuit, Officer Fuhr ordered Krueger to freeze. When the officer had closed to within 3 to 4 yards of Krueger, he saw Krueger reach to the area of his right hip. He heard the sound of an

> object being pulled from Krueger's waistband area. Officer Fuhr testified at his deposition that Krueger pulled a knife from his waistband and was gripping it in his fist.
>
> Officer Fuhr further testified that he believed that Krueger was going to turn and attack him with the knife. Officer Fuhr had been running "as fast as [he] could run" (Joint Appendix at 48) and was fearful that he would be unable to stop in time to avoid the attack. Officer Fuhr slowed down, leveled his service revolver and fired four rounds at the center mass of Leroy Krueger's body. Two rounds struck Leroy Krueger in the back, a third round hit him in the base of the skull. Leroy Krueger died as a result of the wound to the base of the skull. During the subsequent investigation, a Springfield police officer found a knife with an exposed blade approximately 43 feet from the point where Krueger's right foot came to rest on the sidewalk.

*Krueger v. Fuhr*, 991 F.2d 435 at 436-437 (8th Cir. 1993), Appendix to Petition, A-1 through A-3.

Respondent believes the proof raises no factual issues material to *certiorari* even upon full briefing. The facts relied upon by the court below are uncontroverted. However, mindful of the obligation imposed by Rule 15.1, this response will point out some of the erroneous statements of fact contained in the petition including the following:

**Clarification or Distinction of Other Facts**

(1) Petitioner's statement [Petition, p. 5] that at the time Officer Fuhr raised his service revolver and fired

four shots into the center mass of Leroy Krueger's body, "it was obvious that [he] was going to catch him," is taken out of context and misleading. Officer Fuhr's comment that he was going to catch Mr. Krueger in the foot pursuit was made at the end of a sentence wherein he was explaining why Mr. Krueger pulled a knife when the officer had closed to within three to four yards. Officer Fuhr testified at his deposition as follows:

> I realized that I was much too close to him, because I could not stop. If he stopped, my reaction time would not be quick enough that I would not run right up into him with the knife. I immediately then began to bring up my revolver due to the fact of the way he drew the knife. It was a very deliberate and intentional act. It was reach and pull, just like this, and he had it in his hand, gripped in his fist. When I saw him do that, I believed that he was immediately going to turn on me, and that's why he had drawn the knife, because I had caught up with him and it was obvious that I was going to catch him." (J.A. at 49, 50)

(2) Petitioner's assertion (Petition, p. 6) that Mr. Krueger "apparently had been unarmed when he was shot to death," is unsupported by any facts, is pure conjecture and argumentative. To the contrary, Officer Fuhr testified he observed a knife in Mr. Krueger's hand and gave a detailed description of it. (J.A. at 86). Additionally, Officer Fuhr testified that he never saw Mr. Krueger toss the knife in any direction prior to discharging his service revolver. (J.A. at 54).

It is uncontested that a knife was found at the scene which matched Officer Fuhr and John Schmidt's description of the knife they saw in Mr. Krueger's hand immediately prior to the shooting. (J.A. at 223, 228).

## ARGUMENT: REASONS FOR DENYING THE WRIT

### I. THE PETITION RAISES NO SPECIAL OR IMPORTANT QUESTIONS, AND NO EXTREME DEPARTURES FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT REQUIRE THIS COURT'S INTERVENTION.

The petition should be denied because it totally lacks any "special and important reasons" for granting it, as required by Rule 10.1 of this Court. This case presents no new questions of law. It presents no substantial federal constitutional issue of novelty or interpretation. There is no conflict between the judgment of the Eighth Circuit for which review is sought and any decision of another Court of Appeals. Nor has the Eighth Circuit in its judgment "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," as specified in Rule 10.1(a) of this Court.

This is a routine civil rights case involving the issue of whether a police officer's use of deadly force to apprehend a fleeing felony suspect was objectively reasonable within the meaning of the Fourth Amendment. The appropriateness of the substantive law relied upon by the Court of Appeals in granting summary judgment in favor of Respondent, *Tennessee v. Garner*, 471 U.S. 1 (1985), is

not in dispute, and indeed the petition cites no erroneous statements of law on the part of the Eighth Circuit. By no means have Petitioners demonstrated a violation of their Seventh Amendment right to a jury trial, for the Court of Appeals backed its reversal of the District Court with solid legal reasoning based on proper standards of review and basic principles of civil rights law on which there is no controversy. This is a particularly inappropriate case for the granting of a writ of *certiorari*.

## II. THE COURT OF APPEALS' DECISION FOLLOWED PROPER STANDARDS OF REVIEW AND CONSIDERED ALL MATERIAL FACTS IN A LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT.

In the first point of the Petition for Writ of Certiorari Petitioners assert that the decision of the Eighth Circuit failed to consider certain "contradictory" facts in a light most favorable to Petitioners. This is the same shop-worn lament presented in petitions for certiorari any time a court of appeals finds it necessary to grant summary judgment in favor of a respondent. Although Petitioners cite no erroneous statements of law or the application of an improper standard of review by the Court of Appeals, nevertheless they attempt to preserve their Fourth Amendment claim that Officer Fuhr utilized excessive force in effecting the arrest of Leroy Krueger by pointing to bits and pieces of the record that may or may not reflect some "metaphysical doubt" about whether Mr. Krueger was armed with a knife at the time of the shooting.

For example, Petitioners' contention that the knife was not found where it might be expected to be in relationship to where the decedent's body ultimately came to rest is based on speculation and is legally insufficient to preclude summary judgment in this case. Officer Fuhr testified in his deposition that he observed Mr. Krueger pull out a knife when he closed to within three yards of the suspect during the foot pursuit. (J.A. at 37-38). He further testified that he constantly observed Mr. Krueger and did not notice him throw the knife prior to the time he fired his weapon. (J.A. at 52-53). It is uncontradicted that a knife was found at the scene of the shooting, which Officer Fuhr and other witnesses identified as the knife they observed in Mr. Krueger's hand immediately prior to the shooting.

In defining the standard for the granting of summary judgment pursuant to Federal Rule of Civil Procedure 56(c), this Court has recognized that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The "mere existence of a scintilla of evidence" is insufficient; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. at 2512. Accordingly, Petitioners must do more than simply show there is some "metaphysical doubt" as to the material facts. *See, Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In the instant case, the Eighth Circuit correctly recognized that "[The] substantive law determines which facts

are relevant and which are immaterial." The Court of Appeals also acknowledged the principle established by this Court in *Anderson v. Liberty Lobby*, that "only disputes that might affect the outcome will properly preclude summary judgment. *Id.* at 248." Appendix to Petition, A-4.

The Eighth Circuit correctly applied these legal principles when it specifically considered the disputed facts raised by petitioners regarding whether Mr. Krueger was armed at the time of the shooting. Petitioners' post mortem analysis [Petition, p. 9] that the knife was found approximately one and one-half hours after the shooting by an officer who himself has been involved in a similar shooting or that Officer Fuhr never looked for a knife near Mr. Krueger's body after the shooting are insufficient to create a genuine dispute of material fact. Petitioners' contentions regarding who found the knife, as well as when and where it was found, are all circumstances which occurred *after* the shooting. The Eighth Circuit specifically noted that such innocuous facts are neither material or outcome determinative to a determination of whether Officer Fuhr's perceptions and actions *at the time* of the shooting were objectively reasonable. The Court of Appeals recognized the well established standard that the reasonableness of a particular use of force must be "assessed from the point of view of a reasonable officer on the scene" forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving, "rather than from the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 396 at 396, 109 S.Ct. 1865 at 1872 (1989). Appendix to Petition, A-7.

The Court of Appeals then correctly concluded that based upon the undisputed facts, Officer Fuhr's belief that he was facing an armed and dangerous suspect was objectively reasonable, and as a result, even if it is assumed that Mr. Krueger was unarmed at the time of the shooting, that fact alone would not preclude entry of judgment for Officer Fuhr. Appendix to Petition, A-7.

The Court specifically pointed out that the argument advanced by Petitioners demonstrated that they "misapprehend the nature of the Fourth Amendment reasonableness inquiry." Appendix to Petition, A-7. Petitioners still do not seem to get the point, for they continue to ignore the principle that a police officer's "erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable." *Graham v. Connor*, 490 U.S. 386, at 396.

It is noteworthy that many of the facts Petitioners refer to in their petition as the basis for their assertion that "material" facts are in dispute were not raised, briefed, or argued by Petitioners to either the District Court or the Court of Appeals. Indeed, the District Court only noted two facts in its Opinion it believed created genuine issues of material fact, namely: (1) the distance that the knife was found from the body, and (2) the fact that three bullets struck Krueger in the back." The Eighth Circuit specifically explained in its Opinion how neither of these facts were material to a determination of whether Officer Fuhr's actions were objectively reasonable under the Fourth Amendment. (Petition, p. A-6,A-7).

This case was properly decided upon the facts and the law, and the Court of Appeals fully considered all the

issues raised in the Petition for Writ of Certiorari. A decision by this Court thus would be definitive only as to these parties and to like narrow cases presenting these unique facts. Accepting this case would produce rather than remove uncertainty and start a parade of later petitions to this Court. Just as a decision to reverse or restudy the application of the objective reasonableness standard in the context of the Fourth Amendment would promote rather than resolve conflict, a decision to affirm would add little or nothing to the existing body of law on the subject of when a law enforcement officer is authorized to use deadly force to apprehend a fleeing felony suspect.

Accordingly, certiorari should be denied.

## III. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THERE WERE NO MATERIAL FACTS IN DISPUTE AS TO WHETHER THE RESPONDENT POLICE OFFICER ACTED IN AN OBJECTIVELY REASONABLE MANNER IN USING DEADLY FORCE TO APPREHEND LEROY KRUEGER FOR THE REASON THAT RESPONDENT HAD PROBABLE CAUSE TO BELIEVE THAT KRUEGER POSED A THREAT OF SERIOUS PHYSICAL HARM TO RESPONDENT OR OTHERS, THAT DEADLY FORCE WAS NECESSARY TO PREVENT KRUEGER'S ESCAPE, AND A WARNING TO STOP HAD BEEN GIVEN TO KRUEGER BY RESPONDENT.

The Eighth Circuit Court of Appeals held that the undisputed material facts establish that Officer Fuhr's use of deadly force to apprehend Leroy Krueger was reasonable and did not violate his Fourth Amendment rights. Contrary to Plaintiffs' assertion that the Court of

Appeals erred in granting summary judgment in favor of Officer Fuhr, this holding is consistent with the standards of this Court with respect to when the use of deadly force by a police officer to apprehend a suspect fleeing from the commission of a felony is authorized.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this court conclusively declared the substantive law under the Fourth Amendment with respect to the rights of persons suspected of committing violent crimes who are fleeing from apprehension by a law enforcement officer, and who have been warned to halt. In *Garner*, this court held that the use of deadly force to apprehend a fleeing felony suspect is constitutionally permitted and reasonable in certain circumstances:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given to him."

*Garner*, 471 U.S. at 11-12.

Much of the second point of the Petition for Writ of Certiorari is devoted to an argument that the Court of Appeals erred in holding Officer Fuhr's use of deadly force to apprehend a fleeing felony suspect was constitutionally reasonable for the reason that they dispute: (1)

whether Mr. Krueger threatened the officer with a weapon and (2) whether deadly force was necessary to prevent Krueger's escape. In directly addressing each of these contentions, the Eighth Circuit noted that it is undisputed that at the time of the shooting, Leroy Krueger was fleeing from apprehension by a Springfield, Missouri police officer. Appendix to Petition, A-8. The Court also stated that it is undisputed that during the foot pursuit Officer Fuhr knew "that a man fitting Krueger's description was suspected of committing an armed assault at the Tri-States Laundry." and "the suspect probably had a knife and was inebriated." Appendix to Petition, A-6. Despite the uncontradicted evidence establishing that Krueger had committed a crime involving the infliction or threatened infliction of serious physical harm, the Eighth Circuit addressed Petitioners' contention that Krueger was not armed by averting to this Court's statement in *Graham* that "an erroneous perception or belief does not violate the Fourth Amendment if such perception or belief is objectively reasonable", *Graham*, 490 U.S. at 396.

The Eighth Circuit correctly concluded that based upon the radio transmissions informing Officer Fuhr that the individual he was chasing had committed a crime involving the infliction or threatened infliction of serious physical harm and that he will be armed with a knife, Officer Fuhr's belief that he was facing an armed and dangerous suspect was "objectively reasonable". Appendix to Petition, A-7. The Court of Appeals went on to explain that even if it is assumed *arguendo* "that Plaintiffs were able to establish that Krueger was not armed at the time of the shooting, that fact would not preclude entry

of judgment in favor of Officer Fuhr because "[it] was objectively reasonable for Officer Fuhr to believe on the basis of this information he faced a serious and immediate danger of physical harm when Leroy Krueger pulled, or seemed to pull, a knife from his waistband." Appendix to Petition, A-6.

This Court in *Garner* suggested that there are two basic situations which create the requisite "probable cause" which justifies a police officer's belief that a fleeing felony suspect poses a threat of serious physical harm to himself or others: [1] "The suspect threatens the officer with a weapon" *or* [2] there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm . . . " *Garner*, 471 U.S. at 11, 105 S.Ct. at 1701 (emphasis added). In regard to the first situation, Officer Fuhr's uncontroverted testimony established that he had probable cause to believe Krueger posed a threat of serious physical harm to him when he observed Mr. Krueger pull out a knife as he closed to within three yards of the suspect during a foot pursuit in which he was running as fast as he could. (J.A. at 37-38).

The latter situation which *Garner* establishes as justifying a police officer's belief that a fleeing felony suspect poses a threat of serious physical harm to the officer or others does not require that the officer's life actually be threatened by the suspect with the weapon. Rather, the officer is allowed to infer that the suspect is inherently dangerous by the violent nature of the crime he is believed to have committed. Petitioners have admitted in their petition that Officer Fuhr "had probable cause to believe Leroy Krueger had committed a crime involving

the threatened infliction of serious physical harm." (Petition, p. 11). Irrespective of whether this Court chooses to accept Officer Fuhr's uncontradicted testimony that he believed his life was threatened when Mr. Krueger pulled a knife as he was attempting to apprehend him during a foot pursuit, the Eighth Circuit properly held under the standards of *Garner* that Officer Fuhr was reasonably justified in believing that the suspect he was chasing posed a threat of serious physical harm to himself or others as a result of the radio transmissions and Petitioners' admission that "Leroy had committed a crime involving the threatened infliction of serious physical harm." (Petition, p. 11).

Citing *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328 (11th Cir. 1988), Petitioners assert [Petition, p. 15] that the fact Krueger was shot in the back raises a genuine issue of material fact as to whether Officer Fuhr was threatened with a weapon. The Eighth Circuit held this argument to be without merit and discussed at length why the facts of *Samples* were clearly distinguishable from those in the instant case. In noting that under the undisputed facts of this case, "it is not remarkable that an escaping felony suspect would be shot in the back", the Court of Appeals concluded "there is no evidence that requires us to attribute special significance to the fact that Officer Fuhr shot Krueger in the back." Appendix to Petition, A-7 through A-8. Accordingly, the Eighth Circuit correctly applied the legal standards of *Garner* in concluding that the first prong of the *Garner* test had been satisfied.

The balance of the Petition for Writ of Certiorari is devoted to a discussion of the second prong of the *Garner*

test, namely: whether the use of deadly force was necessary to prevent Krueger's escape. The Eighth Circuit recognized and followed the proper legal standards in concluding that "Officer Fuhr's use of deadly force was necessary to prevent escape in accordance with the standards enunciated in *Garner*." Appendix to Petition, A-8. After stating that it was undisputed that Krueger was fleeing police apprehension at the time of the shooting, and acknowledging that other officers were in the general area, the Court of Appeals pointed out that it was not a certainty that another officer might have apprehended Krueger if he eluded Officer Fuhr's foot pursuit. The Court of Appeals recognized the controlling legal principle that: "The Fourth Amendment does not require police officers to forgo the use of deadly force to prevent their own death or serious physical injury whenever there is a possibility that another officer might later apprehend the fleeing suspect. *See, e.g. Fraire v. Arlington*, 957 F.2d 1268, 1276 (5th Cir.) cert. denied, ___ U.S.___, 113 S.Ct. 462, 121 L.Ed.2d 371 (1992)." Appendix to Petition, A-8.

Acceptance of Petitioners' assertion that a police officer may never employ deadly force unless attacked by a suspect possessing a deadly weapon would place a police officer in a dangerous and unreasonable situation. *See, Ryder v. City of Topeka*, 814 F.2d 1412 (10th Cir. 1987). Absent the use of deadly force, Officer Fuhr would have either been stabbed or Krueger would have escaped in the darkened residential neighborhood to continue his deadly doings. Under the totality of the circumstances, the Court of Appeals properly concluded that a reasonable officer could well fear for his safety and that of others, and, accordingly, "Officer Fuhr's use of deadly

force was necessary to prevent escape in accordance with the standards enunciated in *Garner*." Appendix to Petition, A-8.

Nevertheless, Petitioners cite a Sixth Circuit case, *Washington v. Newsom*, 977 F.2d 991 (6th Cir. 1992), to support their contention that the Eighth Circuit should not have granted summary judgment as a matter of law in favor of Officer Fuhr. This case is distinguishable from the case at bar and does not indicate a conflict which would warrant the attention of this Court. In *Washington*, a police officer shot the driver of an automobile as he was fleeing the scene and did not have any information that the driver was armed or dangerous. Although a passenger was reported to have a rifle, the officer admitted that at the time he fired his weapon he did not see any firearm in the hands of the fleeing driver. Moreover, at the time of the shooting, it was daylight and the car was in an open parking lot surrounded by five police officers. In the case at bar, however, there is undisputed evidence to justify Officer Fuhr's belief that the suspect he was pursuing through a darkened residential neighborhood had just committed an armed assault at a nearby business and was reportedly armed with a knife and dangerous. Unlike the officer in *Washington*, Officer Fuhr testified at his deposition that at the time of the shooting he observed a knife in Krueger's fist, and due to his close proximity to the subject, he was in immediate fear of bodily injury. Additionally, Officer Fuhr was alone in his pursuit of Krueger, whereas five officers had surrounded the suspect in *Washington*.

Contrary to the Petitioners' assertion, the court in *Washington* did not hold that all cases involving a law

enforcement officer's use of deadly force to apprehend a fleeing felony suspect must be submitted to a jury. Instead, the court in *Washington* merely concluded that under the unique facts of that case, there were material facts in dispute which should be submitted to the trier of fact. In the instant case, however, the Eighth Circuit followed the legal standards of *Garner* in granting summary judgment in favor of Officer Fuhr on the basis that there were no material facts in dispute. Petitioners' assertion that there is a conflict between the Circuits is nonsense.

Finally, the Eighth Circuit found and Petitioners concede that Officer Fuhr gave Leroy Krueger the feasible warnings for utilizing deadly force as required by the third prong of the *Garner* test. (Petition, p. 11, A-9).

## CONCLUSION

The Eighth Circuit correctly followed the standards of review governing summary judgment and the substantive law set down in *Tennessee v. Garner*, 471 U.S. 1 (1985), in determining that the undisputed material facts of record establish that Officer Fuhr acted reasonably within the context of the Fourth Amendment's "objective reasonableness" standard. The decision below does not conflict with any principles of law, with decisions of other circuits or with proper standards of review. The decision affects only these parties and these particular claims. It does not purport to set any precedent, important or otherwise. Moreover, Petitioners have not presented supportable arguments for any issues that would require review of the well established principles of *Garner* by this

Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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